IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-891

FRANK S. BEAL, Secretary of Welfare of the Commonwealth of Pennsylvania, ROBERT P. KANE, Attorney General of the Commonwealth of Pennsylvania, THE COMMONWEALTH OF PENNSYLVANIA, and F. Emmett Fitzpatrick,

Appellants,

v.

JOHN FRANKLIN, M.D. and OBSTETRICAL SOCIETY OF PHILADELPHIA,

Appellees.

BRIEF OF AMICUS CURIAE FOR UNITED STATES CATHOLIC CONFERENCE

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CONSENT OF THE PARTIES

Both the appellants and the appellees have consented in writing to the filing of this brief amicus curiae by the United States Catholic Conference.

INTEREST OF THE AMICUS CURIAE

I.

Identification of the Amicus

The United States Catholic Conference is a nonprofit corporation and an agency through which the Catholic Bishops of the United States collaborate with other members of the Church—priests, religious and laity—in areas where voluntary collective action on an interdiocesan and national basis can benefit the Church and Society.

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

II.

Interest of the Amicus in This Case

The issue presented in this case is profound and directly affects over a million unborn each year. It is the conviction of this amicus that matters of such fundamental import require consideration from all quarters. A spirit of service to the Court prompts this amicus to submit the arguments contained herein for the Court's consideration.

SUMMARY OF THE ARGUMENT

I.

Biological data rather than a societal consensus must be the criteria used to achieve an adequate and just definition of "human life."

II.

The penumbra of protections afforded by the Bill of Rights guarantees a full "personhood" right to the unborn.

III.

Precious constitutional rights, particularly those which protect and dignify human life, are removed from the political arena and exist independent of the workings of popular opinion.

IV.

Twentieth century scientific data belies antiquated notions of "quickening" and must serve as the standard to determine the nature of human life.

ARGUMENT

I.

BIOLOGICAL DATA RATHER THAN A SOCIETAL CONSENSUS MUST BE THE CRITERIA USED TO ACHIEVE AN ADEQUATE AND JUST DEFINITION OF "HUMAN LIFE"

It is generally true that fetal life is viable if it is left alone. Thus, the issue of viability presented in the instant case is a product of the Abortion Cases and can only be understood as such.[1] These decisions are marked by many inner tensions and inconsistencies, but nowhere are such tension and inconsistency greater or more significant than in the Court's view of unborn life. The dynamism which shapes the present controversy flows directly from the Court's treatment of prenatal life in *Roe v. Wade.*

The principal source of difficulty is that the Court in *Roe v. Wade* created the category of "potential life." Biology recognizes no such category. The human fetus is, in the view of life science, a human life from the onset of conception. It is unquestionably alive; it cannot be characterized as anything less than human. *Byrn v. New York City Hospital,* 42 N.Y. 2d 194-199 91972). Biologically, it is not "potential" human life; it is actual human life in its early stages of growth. It is human life with potential for further development.

The Court's use of the expression "potential human life" manifests a rejection of biological criteria. This is accompanied by the substitution of what might be termed a sociological or normative definition of "human"—a substitution which is crucial, as it provides the rationale of the entire holding. Fetal life can only be "potential" human life if

[1]Roe v. Wade, 410 U.S. 113 (1973). Doe v. Bolton, 410 U.S. 172 (1973).

one is prepared to accept the view that the possession of biologically human life is insufficient to render the possessor "human." Thus, the decision in *Roe v. Wade* is saved from irrationality only by its acceptance of a definition of human life for constitutional purposes that rejects life science and extends recognition as life only to that which societal consensus can agree is human.

It does not follow from the Court's reference to the uncertainty of various segments of our society as to when human life begins that there is any confusion on this point in the life science community. Quite the contrary. There, a uniform consensus exists that the fetus is a human being, a member of the human species which is living.

However, since the Court mandated a sociological criterion, there is now no *legal* criterion for deciding which human lives are to be protected and which are not.

Nothing can be deduced from the Abortion Cases about the limits of the class which is not to be protected. If there are no legal indications, only sociological consensus, then there is literally no human life which cannot ultimately fall victim before such a consensus.

Not all problems which exist in society project a constitutional dimension, nor are all accessible to solution by legal process. It is a fact that many very real social problems do not admit of a legal solution. Furthermore, even those that might yield to a legal solution are not necessarily fit subjects for a constitutional resolution. Here we are faced with a situation in which the Court has chosen to abandon a constitutional mandate to protect human life — a mandate existing through the Fifth and Fourteenth Amendments — in the hope of solving the social problem of women with unwanted pregnancies.

It is surprising that the Court should think so amorphous a condition as unwantedness to be susceptible of solution by judicial adjudication. Instead of readily confronting the fact that the full thrust of its decisions is to prefer some human lives over others, and dealing with the ramifications of such a principle, the Court put before us the notion that it cannot decide when human life begins.

Although the question of when life begins has academic significance, it is unfortunate that so much of the legal controversy surrounding abortion has railed over what is essentially a non-issue. The debate concerns the end of life, not simply the beginning of it. If the process of life has not begun, then what is it that the physician does? Clearly, the "abortion decision" is based on the fundamental understanding between woman and physician that, unless something is done to stop it, a child is going to be born; in each abortion a consensus exists between the woman and her doctor that a life has begun.

It is clear from the foregoing that the concept of viability enunciated in the decision of *Roe v. Wade* involves at once a *de facto* confirmation and a *de jure* denial of the human existence of the unborn child. This is a fundamental contradiction.[2] The rejection of the necessary relation of

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[2]The Federal Rules of Evidence require, pursuant to Rule 201, that only adjudicative facts which are indisputable may be subject for judicial notice. While the federal rules were not in force at the time of the ruling in the Abortion Cases, the doctrine which they express regarding judicial notice was already well established. It is impossible to view the *Roe* decision as not having an adjudicative quality as that holding relates to fetal life. Curiously, the judicial notice taken in *Roe* has all but eliminated the possibility of the "disputed" facts regarding fetal life every becoming an adjudicative concern. See Davis, Judicial Notice, 55 Col. L. Rev. 945, 952 (1955).

fetus to child has placed the Court in an ambiguous posture in relation to "potential life".

The Court in *Roe v. Wade* made an attempt to perceive the societal or normative consensus regarding the quality of life to be recognized as human. The majority there acted on the perception that a "viable" fetus would be accepted as sufficiently "human" to warrant state protection of that life.

The Court's definition of life is not anchored to biology. It is therefore likely that the abandonment of biological life as a criterion of Fifth Amendment protection will continue in the future to place the Court in the position of having to supply frequent and continuing redefinitions of the term "human".

II.

THE PENUMBRA OF PROTECTIONS AFFORDED BY THE BILL OF RIGHTS GUARANTEES A FULL "PERSONHOOD" RIGHT TO THE UNBORN

Coincidental with the Court's rejection of a biological criterion of human life, the majority in *Roe v. Wade* found that the unborn child lacks legal personhood. Legal personhood is not coeval with any "human" characteristics. Legal personhood is and has for some time been recognized in respect to objects such as ships and entities such as corporations which have absolutely *no* potential for ever being "human."

> "The world of the lawyer is peopled with inanimate right-holders; trusts, corporations, joint ventures, municipalities, Subchapter R partnerships, and nation-states, to mention just a few. Ships, still referred to by the courts in the feminine gender, have long had an

> independent jural life, often with striking consequences. We have become so accustomed to the idea of a corporation having 'its' own rights, and being a 'person' and citizen for so many statutory and constitutional purposes, that we forget how jaring the notion was to early jurists. 'That invisible, intangible and artificial being, that mere legal entity' Chief Justice Marshall wrote of the corporation in Bank of the *United States v. Deveau*—could a suit be brought in its name? Ten years later, in the Dartmouth College case, he was still refusing to let pass unnoticed the wonder of an entity 'existing only in contemplation of law.' "[3]

The granting of legal personhood in such instances is, we submit, properly the product of a constitutional analysis which recognizes the existence of rights which must be said to be implicit in other, more explicitly protected rights. The process of analysis which found these rights to reside in the penumbra of others operates on acceptance of a causality which recognizes the force of a necessary implication. The right of property guaranteed in the Constitution carries with it the implication that the causal connection between a business organization and the contractual relationships that flow therefrom imply a legal significance great enough to provide that "invisible" intangible, and artificial being" with legal personhood.

Recognition of the legal significance of such causal implication is not limited to personification of business organizations. The process used to reach the penumbral rights enunciated in *Griswold v. Connecticut*[4] is the self-

[3]Stone, Christopher, *Should Trees Have Standing*, Kaufman, 1972, p. 5.

[4]Griswold v. Connecticut, 381 U.S. 479 (1965).

same recognition of necessary implication. Penumbral rights are, quite simply, those rights which must be recognized because they are necessarily implied in an explicitly protected right.

Essentially positive and creative, this penumbral process has recognized rights such as those in *Maynard v. Hill*,[5] *Meyer v. Nebraska*,[6] *Pierce v. Society of Sisters*,[7] and *Griswold v. Connecticut*,[8] as well as those found in *Loving v. Virginia*,[9] *Skinner v. Oklahoma*,[10]. But this process was harshly rejected by the majority in *Roe v. Wade* when it refused to protect fetal life, even though such life has a necessary, not coincidentally antecedent, connection to the lives of all those "persons" protected by explicit mandate of the Constitution.

There is a curious fact in that one of this Court's most resounding paeons to Mill's essay *On Liberty* should manifest a line of reasoning similar to Mill's theory of cause. The Court's treatment of fetal life is "an empiricism like that of John Stuart Mill, for whom a cause simply is an antecedant, and for whom consequently all knowledge is mere observation of fact, devoid of any apprehension of necessity."[11]

It is ironic that the majority in *Roe* not only failed to use the penumbral process with respect to fetal life, but also misapplied it with respect to the pregnant woman. The right

[5]Maynard v. Hill, 125 U.S. 190 (1888).

[6]Meyer v. Nebraska, 262 U.S. 390 (1923).

[7]Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[8]Griswold, supra, n. 13.

[9]Loving v. Virginia, 388 U.S. 1 (1967).

[10]Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535 (1942).

[11]Collingwood, R.G., *The Idea of Nature*, p. 163.

to life is explicitly protected in the Fifth and Fourteenth Amendments; and, by the penumbral process, this protection properly and necessarily should extend to embrace fetal life. A fetus is not a "different being" from a human being. A human being after birth is the "same being" as before; he or she is merely at a different state of development from his or her fetal stage. A human life is a continuum, not a chain of loosely linked segments, and one's existence is assured at the biological level by the same kinds of internal stimuli and reactions throughout one's temporal development. The human element cannot be divorced from *zoos*. There can be no "human" life without human fetal life.

The Mill-like view of the causal relationships between the unborn child and the born adopted by the *Roe* majority and the Court's concommitant rejection of the biological criterion of life are also accompanied by a rejection of the penumbral process which would lead to the recognition of legal personhood. Can it be said that the liberty of the Fifth and Fourteenth Amendments *necessarily* implies a right to abortion? Implication, it should be noted, is not the same as inference. A thing is implied because of the logical necessity that it be so. Is there really a necessity that liberty encompass a private right to end the life of a human fetus?

III.

PRECIOUS CONSTITUTIONAL RIGHTS, PARTICULARLY THOSE WHICH PROTECT AND DIGNIFY HUMAN LIFE, ARE REMOVED FROM THE POLITICAL ARENA AND EXIST INDEPENDENT OF THE WORKINGS OF POPULAR OPINION.

The Court's use of sociological definitions of "human" must be considered in light of one of the aspects of real genius possessed by the United States Constitution. That document removes certain civil rights from the workings of the popular will. Control over certain matters is taken from the various branches of the United States government and from the states by the Bill of Rights and the Fourteenth Amendment respectively. Chief among these civil rights is the right to life, which must not be taken away without due process of law. Before the Abortion Cases, the right to take a life was, under our constitutional system, presumed to be a public right, exercised only under the most rigid controls of due process. Furthermore, the right is fixed in the Constitution and may not be altered by popular consensus, legislatively manifested or otherwise. Thus, a statute which repealed homicide laws would be unconstitutional since it would remove the protection of life from the public sector and locate it in the private sector. Authority for homicide laws, it should be noted, is not founded on any sociological data relating to homicide; rather, it springs from the constitutional protection of life.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be subitted to vote; they depend on the outcome of no elections.[12]

Nor, it might be added, on public opinion polls.

The effect of the decisions in *Roe v. Wade* and *Doe v.*

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[12] *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624.

Bolton is to endanger civil rights in precisely the way the Constitution was designed to prevent. These decisions subordinate a protected right to the caprice of societal evaluation. Constitutional guarantees of due process are removed, and a protected right is subjected to an extra-legal system of societal consensus rather than the rigorous and objective test of a biological fact. The popularity of a given norm will govern its applicability to the law. *Roe v. Wade* uniquely opens a protected constitutional right to the workings of the popular will.

It is human life that is guaranteed by the Constitution, not the "quality of life". The determination of "quality" is inherently subjective and involves the overwhelming discretionary authority which has been condemned by this Court in many other instances.

The Roe-Doe majority has acted to alter the subtance of the constitutional guarantees to life by way of a redefinition of the term "human" which restricts that term to those able to pass the muster of "meaningful" life. The Court's rejection of the traditional biological criterion has significantly altered the Fifth Amendment guarantees, to such a point that more than biological life is required to invoke them. The Court's use of the ambivalent and universally subjective term "meaningful" must excite speculation as to how much more might be required to invoke these guarantees. In any event, it is clear that all protected life—including life after birth—is now subject to an inchoate consensus among undefined groups as to what is "human".

IV.

TWENTIETH CENTURY SCIENTIFIC DATA BELIES ANTIQUATED NOTIONS OF "QUICKENING" AND MUST SERVE AS THE STANDARD TO DETERMINE THE NATURE OF UNBORN HUMAN LIFE.

The Court has suggested that women "enjoyed rights" to abortion in common law. How is it possible to extrapolate to such a conclusion from a handful of 300-year-old cases? Despite the Supreme Court's approbation, it is unclear that Professor Means' arguments demonstrate "abortional freedom" to be a common law right. There is a substantial distinction between uneven enforcement of a law and an affirmative right. The motive of this resort to history is unclear. According to Albert Camus in *The Rebel*:

> "... The movement of rebellion is founded on the confused conviction of absolute right which, in the rebel's mind is more precisely the impression that he has 'the right to' ... Rebellion cannot exist without the feeling that somewhere, somehow, one is right." [13]

Perhaps it is curious need that sent Professor Means searching out the past for comfort. Returning from those halcyon days, however, he did not bring with him an integral view of the past as it was. He brought instead a 'past' useful to his pleading, while leaving the rest for others to retrieve.

The classic exposition of this type of historiography was written by Herbert Butterfield. His essay focused on what he dubbed the "Whig Fallacy." In essence, the theme of his work is that:

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[13]Camus, A., *The Rebel*, p. 1.

> "... When we organize our general history by reference to the present we are producing what is really a gigantic optical illusion; and that a great number of the matters in which history is often made to speak with most certain voice, are not inferences made from the past but are inferences made from a particular series of abstractions from the past — abstractions which by the very principle of their origin beg the very questions that the historian is pretending to answer."[14]

The decisions in the Abortion Cases did not show us the past. They only used it. Those, however, who go to the past to use it inevitably succumb to the "pathetic fallacy":

> "It is the result of the practice of abstracting things from their historical context and judging them apart from their context — estimating them and organizing the historical story by a system of direct reference to the present."[15]

Neither Professor Means nor the Court provided a picture of abortion practice during the period to which they refer. Such a history would have to include attendant medical, social, and, yes, even religious practices. This history was not provided. For Professor Means as well as for the Court, the past is slave to the present. This may be effective polemics but it is not history. The historian, in Butterfield's words:

> "...comes to his labours conscious of the fact that he is trying to understand the past for the sake of the past, and though it is true that he can never entirely abstract himself from his own age, it is nonetheless certain that his consciousness of his purpose is a very different one from that of the Whig historian, who tells himself that he is studying the past for the sake of the present. Real historical understanding is not achieved by the subordination of the past to the present, but rather by

[14]Butterfield, H., *The Whig Interpretation of History* (1965), p. 29.

[15]ibid p. 30.

> our making the past our present and attempting to see life with the eyes of another century than our own."[16]

The argument that abortion rights were freer in the past is indeed curious. One is led to wonder why it was made.

What is the nature of this relevancy? Implicit in the argument is the notion that the action of a thirteenth century individual participating in an abortion is somehow relevant to our own time. Is this so? In the first place, the Means argument does not demonstrate that thirteenth century society ever embraced "abortional freedom." Second, it is fallacious to suggest that people of the twentieth century are free to ignore available information and to make judgments on the basis of the actions of a small number of those of the thirteenth century. In short, the relevancy of the Means argument to the abortion debate turns on willingness to ignore differences between our age and the thirteenth century. This is a fundamental error in the common law argument adopted by the Court.

The works of Coke and Bracton did not contemplate twentieth century science. Presumably the Court is not prepared to rely on thirteenth century science; why, then, should it attach particular significance to "quickening?" What is quickening but a measurement, albeit crude, of the development of the unborn child? Surely, the ability to measure has advanced significantly since the thirteenth century. In fact, ability to measure is an important aspect of the advance of all science.

> "Empirical inquiry has been conceived as a process from description to explanation . . . the principal technique in effecting the transition from description to explanation is measurement."[17]

The increased ability to measure has given the twentieth

[16]ibid. p. 16.

[17]Lonegran, B.J.F., *Insight*, p. 164-5.

century man a greater appreciation of life as a continuum. One can study the zygote and know the significance of the genetic package.

Clearly, a full unraveling of a "significant strand of the tangled skein" would have required consideration of twentieth century science. This would have shown that it is no longer possible to separate what an organism is from what, in its later development, it does. Admittedly, *any* position concerning the unborn child necessarily involves important religious and philosophical considerations. However, this is not to say that science may be ignored, especially by a government agency. An unborn child has many characteristics; it becomes, it grows, it continues its many functions until that event known as death. To rely upon scientific standards of the thirteenth century in this matter is unacceptable.

Professor Means' argument is simply not relevant to the abortion debate. Viability and quickening have little to do with a twentieth century scientific conception of the nature of the unborn child.

CONCLUSION

Not only were the abortion cases wrongly decided; it was wrong that they be decided at all. With rare unanimity the community of legal scholars, regardless of their views on the practice of abortion, have commended on the lack of any constitutional nexus in the abortion cases.

Mr. Justice White's observation that the court simply fashioned a new right and announced it, has been recognized as apposite in the legal community.[18] The fundamental difficulty with such activity is that, when the Court acts as a legislature, there is no court. The adjudicative function is both a necessary and a specialized activity within our system. If this court is to function as a legislature, where shall one turn for the adjudication of a dispute? At least one scholar has taken the view that judicial overreaching is simply the usurpation of governmental powers not constitutionally granted to the Court. But, as we suggested above, the matter is not merely a question of what power the court takes unto itself; it is also a question of what powers and responsibility it leaves behind.

This amicus recognizes the difficulty attendant upon reversal of the Abortion Cases and their progeny. *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49

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[18]Bickel, Alexander, The Morality of Consent, (1975) New York, Yale University Press.

Black, Charles L., Brook Review of The Role of the Supreme Court in American Government by Archibald Cox, The New York Times Book Review, Feb. 29, 1976.

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L.Ed.2d 788 (1976) and *Baird v. Bellotti*, 428 U.S. 132, 96 S. Ct. 2857. Nevertheless, we submit that to preserve in decisions which have been wrongly decided and wrongly arrived at can only produce new and greater difficulty.

These issues of life and death cannot be willed away by a determined court. Let us wipe the slate clean and start anew.

Respectfully submitted,

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